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No. 82-1326

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

*v.*

STATE OF CALIFORNIA, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

Whether an outer continental shelf lease sale that does not authorize any conduct having a physical impact upon the coast is a federal activity "directly affecting the coastal zone" within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1).

## PARTIES TO THE PROCEEDINGS

This litigation was commenced by the filing of separate but virtually identical complaints by the State of California and various environmental action groups. Parties plaintiff include the State of California, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. Several Cailfornia political subdivisions intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma; the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments. Named as defendants, in addition to the Secretary of the Interior, were the United States Department of the Interior; the United States Bureau of Land Management; Edward Hastey, then Acting Director of the United States Bureau of Land Management; and Robert Burford, then Director Designate and now Director, United States Bureau of Land Management. The Western Oil and Gas Association

intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co.

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*v.*

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## BRIEF FOR PETITIONERS

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 683 F.2d 1253. The opinion of the district court (Pet. App. 34a-78a) is reported at 520 F. Supp. 1359.

### JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982 (Pet. App. 82a). A timely petition for rehearing was denied on November 10, 1982 (Pet. App. 83a). The petition for a writ of certiorari was filed on February 8, 1983, and granted on May 16, 1983 (J.A. 156).[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1), provides (Pet. App. 84a):

[1] The petition for a writ of certiorari in *Western Oil & Gas Association* v. *California*, No. 82-1327, and the conditional cross-petition in *California* v. *Watt*, No. 82-1511, were also granted on May 16, 1983.

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

Pertinent provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. V) 1331 *et seq.*, are reprinted at Pet. App. 87a-99a.

## STATEMENT

Pursuant to Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. 1456(c)(1) ("CZMA"), federal "activities directly affecting the coastal zone" are subject to the substantive requirement that they be conducted in a manner that is consistent "to the maximum extent practicable" with an approved state coastal zone management program. This litigation raises the question whether the substantive consistency requirement of Section 307(c)(1) properly applies to an outer continental shelf ("OCS") oil and gas lease sale conducted pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. V) 1331 *et seq.* ("OCSLA"), when that sale has no physical impact upon the coastal zone but merely sets in motion a chain of events that may eventually result in such an impact.

1. a. The Coastal Zone Management Act of 1972, 16 U.S.C. (& Supp. V) 1451 *et seq.*, was enacted to encourage the wise use of the land and water resources of the coastal zone through the development and implementation of state management programs (Section 303, 16 U.S.C. (Supp. V) 1452).[2] Before a state management

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[2] Under the Act, the coastal zone includes coastal waters and adjacent shorelands with the exception of federal property. The zone extends seaward to the outer limit of United States territorial waters, three geographical miles from the coastline (Section 304(1), 16 U.S.C. 1453(1)). The outer continental shelf, by definition, lies beyond the belt ceded to the states in 1953 by the Submerged Lands Act, 43 U.S.C. 1301(a), (b); 43 U.S.C. 1331(a). In the case of California, like all other states bordering on the

program becomes effective, it must be approved by the Secretary of Commerce (Sections 305(h), 306(c), 16 U.S.C. 1454(h), 1455(c)), who must insure that the views of the federal agencies principally affected by the state's program have been adequately considered (Section 307(b), 16 U.S.C. 1456(b)). Following approval of a state management program, the activities of the federal government, as well as the actions of its licensees and permittees, must meet the various consistency requirements of the Act (Section 307(c), 16 U.S.C. (& Supp. V) 1456(c)).

Section 307(c)(1) of the CZMA sets forth the consistency requirements imposed upon the activities of the federal government. The section mandates that each federal agency "conducting or supporting activities affecting the coastal zone" conduct or support those activities "in a manner which is, to the maximum extent practicable, consistent with approved state management programs" (16 U.S.C. 1456(c)(1)). Pursuant to Commerce Department regulations implementing this provision, federal agencies are required to prepare a document termed a "consistency determination" for any activity that will have a direct effect upon the coastal zone of a state with an approved management program (15 C.F.R. 930.34).[3] The consistency determination identifies the direct effects of the federal activity and provides the state with an explanation of how the federal agency has tailored its proposed activity to achieve consistency with the state program (15 C.F.R. 930.39).

Section 307(c)(3)(A) of the Act, 16 U.S.C. 1456(c)(3)(A), addresses the consistency obligations of most

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Pacific or Atlantic Oceans, the "coastal zone," like the Submerged Lands Act grant, extends three geographical miles seaward from the coastline. 43 U.S.C. 1301(b). See *United States* v. *California*, 381 U.S. 139 (1965).

[3] If the federal agency determines that an activity will not directly affect a coastal zone, the agency, in certain circumstances, must provide the state with notification of its "negative determination" (15 C.F.R. 930.35(d)).

federal licensees or permittees. Applicants for federal licenses or permits are required to supply consistency certifications for any "activity affecting land or water uses in the coastal zone." 16 U.S.C. 1456(c)(3)(A). The state is then given an opportunity to concur with the certification. If the appropriate state authorities decline to concur, the federal agency from whom the license or permit is sought must reject the application. The state's veto of an applicant's consistency certification can be overridden by the Secretary of Commerce, however, if the Secretary finds that the applicant's proposed activity is consistent with the CZMA or is otherwise necessary in the interest of national security (*ibid.*).

In 1976, Congress added Section 307(c)(3)(B), 16 U.S.C. (& Supp. V) 1456(c)(3)(B), to the consistency provisions of the Act for the express purpose of integrating petroleum development activities on the outer continental shelf into the CZMA's statutory scheme. H.R. Conf. Rep. No. 94-1298, 94th Cong., 2d Sess. 30-31 (1976). Under Section 307(c)(3)(B), any lessee seeking approval of exploration, development or production plans for areas leased under the OCSLA must "attach to such plan a certification that each activity * * * described in detail in such plan" will be carried out in a manner consistent with an approved program if it "affect[s] any land use or water use in the coastal zone." This consistency certification, like the certification required by Section 307(c)(3)(A), is subject to state concurrence or override by the Secretary of Commerce prior to the issuance of any federal permit or license for the activities described in the plan. Thus, the states have significant substantive control over all exploration, development and production activities on the OCS that affect the coastal zone. Moreover, as detailed below, this CZMA consistency certification requirement has been specifically incorporated into the Outer Continental Shelf Lands Act. 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d).

b. The Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 *et seq.*, was enacted in 1953 to authorize

federal leasing of the outer continental shelf for oil and gas development beyond the state territorial sea belt. See note 2, *supra*. In 1978, Congress amended the OCSLA (Pub. L. No. 95-372, 92 Stat. 632 *et seq.*) to provide for, *inter alia*, the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS. 43 U.S.C. (Supp. V) 1332(3). H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 53 (1977). The Act, as amended, establishes distinct stages for federal decision-making regarding oil and gas development activities on the OCS, and specifically provides for input by affected states as well as a balancing of environmental concerns at each stage of the OCS oil and gas process. The stages in that process can be described as (1) development of a leasing program, 43 U.S.C. (Supp. V) 1344; (2) preparation and leasing, 43 U.S.C. (Supp. V) 1337(b); (3) exploration, 43 U.S.C. (Supp. V) 1340; and (4) development and production, 43 U.S.C. (Supp. V) 1351.[4]

Section 18 of the OCSLA, 43 U.S.C. (Supp. V) 1344, requires the preparation of a five-year leasing program to provide an overall framework and schedule for OCS lease sales. During the preparation of a five-year leasing program, the Secretary is required to solicit comments from "any interested Federal agency" and the "Governor of any State which may become an affected State under such proposed program" (43 U.S.C. (Supp. V) 1344(c)(1)). The Secretary is required to respond in writing to all comments or requests received from a state governor, "stating his reasons" for "granting or denying such request in whole or in part" (43 U.S.C. (Supp. V) 1344(c)(2)). The proposed program is then

[4] Some provisions of the OCSLA apply throughout all stages of the OCS oil and gas process. Regulations promulgated pursuant to 43 U.S.C. (Supp. V) 1334(a)(1)(B), for example, provide for suspension or temporary prohibition of all OCS operations if "there is a threat of serious, irreparable or immediate harm" to life or the environment. 30 C.F.R. 250.12(a)(1)(ii). The regulations also provide for cancellation of leases if such dangers cannot be resolved. 30 C.F.R. 250.12(d)(4).

published in the Federal Register for a 90-day comment period, and is thereafter submitted to the President and Congress, together with all comments received and all correspondence between the Secretary and the governor of an affected state (43 U.S.C. (Supp. V) 1344(c)(2), (3) and (d)(1), (2)). After a Section 18 program is approved, OCS lease sales proceed in conformity with its month-by-month schedule. 43 U.S.C. (Supp. V) 1344 (d)(3).

The solicitation of bids and issuance of offshore leases constitute the next stage of the OCS oil and gas process. 43 U.S.C. (Supp. V) 1337(a). Prior to the actual lease sale, however, the Secretary is required to undertake a variety of discrete actions. See 43 C.F.R. 3310 *et seq.* (to be recodified at 30 C.F.R. 256). An environmental impact statement ("EIS") is normally prepared pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* ("NEPA"), and consultation among various government agencies may be initiated under Section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. (Supp. V) 1536(a) ("ESA"), if any listed species may be affected by the proposed lease sale. More important, under Section 19(a) of the OCSLA, the governor of any affected state, as well as the executives of any affected local governments, are given a formal opportunity to submit recommendations regarding "the size, timing and location" of a proposed lease sale. 43 U.S.C. (Supp. V) 1345(a). The Secretary is directed to accept these recommendations if he determines that they provide a reasonable balance between the national interest and the well-being of the citizens of the affected state. 43 U.S.C. (Supp. V) 1345(c). The Secretary's resolution of any conflicts at this stage is final and may be set aside only if found to be arbitrary or capricious. 43 U.S.C. (Supp. V) 1345(d).

Following these preparatory steps, which include the publication of a proposed and final notice of the lease sale (30 C.F.R. 256, Subpt. F), the Secretary may proceed with the actual lease sale. The OCSLA authorizes

the Secretary to grant leases to the highest responsible qualified bidders at the sale. 43 U.S.C. (Supp. V) 1337 (a). The lease awarded at the sale, however, entitles its holder to undertake only extremely limited activities without further federal approval. See 43 U.S.C. (Supp. V) 1340(c) (approval required prior to exploration); 43 U.S.C. (Supp. V) 1351 (approval required prior to development and production). Regulations promulgated by the Department of the Interior provide that a lease only entitles its holder to conduct "preliminary activities" on the OCS. 30 C.F.R. 250.34-1. These "preliminary activities" are defined as "geophysical, and other surveys necessary to develop a comprehensive exploration plan" so long as such activities "do not result in any physical penetration of the seabed of greater than 300 feet of unconsolidated formations" and "do not result in any significant adverse impact on the natural resources of the [OCS]" (*ibid.*). More extensive activity is permitted only upon a lessee's compliance with the procedures and substantive requirements of the next stage: exploration.

Prior to commencing exploration activities, a lessee must submit a detailed exploration plan to the Secretary for approval. 43 U.S.C. (Supp. V) 1340(c). The Secretary must disapprove a plan if the activity would likely cause serious harm or damage to life or property or to the marine, coastal or human environment. *Ibid.* A lessee submitting a plan that affects any land or water use in the coastal zone of a state with an approved management program must also attach to the plan a certification that the activities described in the plan comply with the state's coastal zone management program. *Ibid.*; 16 U.S.C. (& Supp. V) 1456(c)(3)(B). The Secretary may not grant any license or permit for any activity described in an exploration plan until the state concurs with the certification of compliance, or a determination of consistency or necessity is made by the Secretary of Commerce. *Ibid.* Only after an exploration plan is approved will drilling permits and other necessary licenses be issued to authorize exploration activities.

The final stage under the OCSLA, development and production, is reached only if commercial quantities of oil and gas are discovered. As with the exploration stage, the lessee must submit a detailed development and production plan to the Secretary for approval prior to commencing any production activities on the OCS. 43 U.S.C. (Supp. V) 1351(a)(1).[5] The plan, together with all supporting documents, is submitted by the Secretary to the governor of any affected state for comment and review (43 U.S.C. (Supp. V) 1351(a)(3) and (g)). To obtain approval, the plan must be in compliance with the OCSLA and its implementing regulations (43 U.S.C. (Supp. V) 1351(h)(1)(A)), and must include a certification of consistency with the coastal zone management program of any affected state. 43 U.S.C. (Supp. V) 1351(d); 16 U.S.C. (& Supp. V) 1453(c)(3)(B).[6] Approval of the development and production plan is contingent upon an affected state's concurrence with or the

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[5] The plan must describe all facilities, on or off the OCS, that will be utilized in the development and production of oil and set forth all environmental safeguards and other safety standards that will be implemented during production (43 U.S.C. (Supp. V) 1351(a)(2) and (c)).

[6] At least one development and production plan in any area or region of the OCS (other than the Gulf of Mexico) must be declared a "major Federal action" for purposes of NEPA (43 U.S.C. (Supp. V) 1351(e)), and the ensuing draft environmental impact statement on the development plan must be sent to the governor of any affected state for review and comment (43 U.S.C. (Supp. V) 1351(f)) prior to the public hearing on the EIS (43 U.S.C. (Supp. V) 1351(h)). The Secretary is directed to disapprove a development and production plan if exceptional geological conditions, marine or coastal resource values, or other exceptional circumstances dictate disapproval despite compliance with the Act and its regulations. 43 U.S.C. (Supp. V) 1351(h)(1)(D). If these circumstances cannot be cured or mitigated in a five-year period, the lease will be cancelled and the lessee will be entitled to compensation. 43 U.S.C. (Supp. V) 1351(h)(2)(C). If the Secretary disapproves a development and production plan for other reasons, including failure to obtain state concurrence on CZMA consistency, no compensation is afforded the lessee. 43 U.S.C. 1351(h)(2)(A).

Secretary of Commerce's override of the state's objections to this consistency certification. 43 U.S.C. (Supp. V) 1351 (h)(1)(B). Finally, Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345, grants the governor of an affected state as well as appropriate representatives of local governments a formal opportunity to submit recommendations with respect to a proposed development and production plan. As with the comments received concerning the lease sale itself (page 6, *supra*), the Secretary is to accept the state's recommendations if they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state. 43 U.S.C. (Supp. V) 1345(c). Again, the Secretary's decision is final unless found to be arbitrary and capricious. *Ibid.*

2. This litigation arises out of the Department of the Interior's decision to offer 111 OCS tracts off central California for leasing under the OCSLA (46 Fed. Reg. 23678-23680 (1981)). As contemplated by the statutory scheme outlined above, the State of California has been intimately involved in the administrative procedures leading up to that decision.

Preparation for OCS Lease Sale No. 53, Santa Maria Basin, began in the early fall of 1977, when Interior requested the Geological Survey and other federal and state agencies to provide reports on potential oil and gas resources located in the Pacific OCS from Point Conception, Santa Barbara County, California, north to the California-Oregon border (C.R. 85; A.R. 1w-15w).[7] In November 1977, the Department published a "[c]all for [n]ominations" that requested potential bidders, as well as federal, state and local governmental agencies, environmental organizations and the public, to identify which of some 2,036 blocks in the area should be offered for lease and which should be restricted or specifically excluded. 42 Fed. Reg. 60794 (1977). After reviewing this information, on October 10, 1978, Interior selected 243 blocks

[7] "C.R." refers to the Clerk's Record; "A.R." refers to the Administrative Record.

for further environmental analysis and consideration (C.R. 85; A.R. 91w). See 43 C.F.R. 3314.1(a). Of these 243 blocks, 115 were located in the Santa Maria Basin located off western Santa Barbara and San Luis Obispo Counties, California. The remaining 128 blocks were located in four basins farther north.

After the tentative selection of these blocks, the Department's Bureau of Land Management began to evaluate the potential environmental impact of oil and gas operations in the identified areas. The Bureau conducted a series of meetings in California, in which several state agencies participated, to identify the issues that should be discussed in the forthcoming draft environmental impact statement (44 Fed. Reg. 26215 (1979)). In April 1980, Interior issued the draft EIS and scheduled six more public hearings in California to discuss it (45 Fed. Reg. 30703).[8] The Bureau of Land Management also initiated consultations with the United States Fish and Wildlife Service and the National Marine Fisheries Service concerning the impact of OCS Lease Sale No. 53 on the species protected by the Endangered Species Act of 1973, 16 U.S.C. (& Supp. V) 1531 *et seq.*[9]

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[8] During the course of those hearings 745 persons commented orally and extensive written comments were received from the state, its coastal commission and numerous local governments (C.R. 85; A.R. 165w, 172w). The state's comments on the draft EIS primarily addressed potential operations in the four northern basins included in proposed OCS Lease Sale No. 53. The California Coastal Commission recommended removing three of the four northern basins from the sale and delaying the sale in the Santa Maria Basin and the one remaining northern basin (J.A. 76).

[9] The Fish and Wildlife Service subsequently issued a biological opinion "that your action, as proposed, is not likely to jeopardize the continued existence of the [southern] sea otter" (C.R. 85; A.R. 183w). The National Marine Fisheries Service also issued a "no jeopardy" biological opinion for the gray whale, which migrates through the proposed sale area (C.R. 85; A.R. 182w). Both agencies limited their "no jeopardy" opinions to the lease sale and exploration stages of the OCS process, and recommended further

In September 1980, Interior issued a final EIS addressing the potential environmental impacts from leasing all 243 tracts in the five OCS basins. One month later, on the basis of the EIS, the biological opinions of the Fish and Wildlife Service and the National Marine Fisheries Service, and the other data in the administrative record, the former Secretary of the Interior, Cecil D. Andrus, decided to exclude the four northern basins from Lease Sale No. 53.[10] On October 17, 1980, a proposed notice of sale was issued, limiting bidding to 115 tracts in the Santa Maria Basin (45 Fed. Reg. 71140). On October 24, 1980, Interior sought the recommendation of former Governor Edmund G. Brown of California as to the "size, timing or location" of the lease sale pursuant to Section 19(a) of the OCSLA, 43 U.S.C. (Supp. V) 1345(a).

In the course of these proceedings, the California Coastal Commission, on July 8, 1980, informed the Secretary of its conclusion that Lease Sale No. 53 was a federal activity directly affecting the California coastal zone within the meaning of Section 307(c)(1) of the CZMA, 16 U.S.C. 1456(c)(1). The coastal commission demanded a "consistency determination" from Interior that the lease sale would be "consistent" to the "maximum extent practicable" with its coastal zone management program (J.A. 63). The Department of the Interior reviewed the "possible effects of the department's pre-lease activities" and determined that the lease sale and the award of leases would not directly affect the California coastal zone (*id.* at 66). Interior thereafter notified the coastal commission of its negative determination and explained the reasoning

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consultation if development and production stages were ever reached (A.R. 182w, at 14).

[10] The data upon which this decision was based were compiled into a Secretarial Issue Document ("SID"), "an internal document intended to aid the Secretary in making decisions concerning lease sales" (Pet. App. 9a).

underlying that conclusion (*id.* at 66-68). 15 C.F.R. 930.35(d).[11]

In response to Interior's finding that Lease Sale No. 53 did not satisfy the threshold test of Section 307(c)(1) of the CZMA, the California Coastal Commission adopted a resolution on December 16, 1980, reiterating its view that the sale directly affected the coastal zone. The resolution acknowledged that, by removing the four northern basins from the sale, the Secretary had fully responded to the state's initial objections raised in its comments on the draft EIS (J.A. 76). The commission nevertheless concluded that 31 more tracts would have to be removed from the sale because "leasing within 12 miles of the Sea Otter Range in Santa Maria Basin would not be consistent" with the California Coastal Management Program (*id.* at 79). Although the commission made no findings justifying its selection of a 12-mile buffer zone, it asserted that the "national interest in protecting the small population of the threatened southern sea otter" outweighed the "petroleum resource potential of the 31 tracts * * *" (*id.* at 76-77). On December 24, 1980, Governor Brown similarly recommended the deletion of 34 tracts in the Santa Maria Basin that "are directly seaward of the habitat, breeding and food supply area of the Southern Sea Otter" (C.R. 85; A.R. 224w).

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[11] Interior's submission to the state addressed California's contention that the possible impact of exploration, development and production activities on the coastal zone were "direct effects" of an OCS lease sale. Interior explained that the possible effects of exploration, development and production activities were not "direct effects" of the lease sale, but rather of subsequent licensing procedures that were themselves subject to the consistency requirements of Section 307(c)(3) of the CZMA, 16 U.S.C. (& Supp. V) 1456(c)(3). This statutory framework, Interior reasoned, assures the state "that, by exercise of its own authority, only consistent activities will occur after the lease award" (J.A. 67). The state "does not have to reach out through Federal pre-lease consistency responsibilities, to limit sale proposals and thereby preclude energy development opportunities before specific activities are proposed or their specific coastal effects evaluated" (*ibid.*).

The new Secretary of the Interior, James G. Watt, issued a revised proposed notice of sale for Lease No. 53 on February 10, 1981. The Secretary reaffirmed his predecessor's intention to offer the 115 Santa Maria Basin tracts, and also proposed to offer the four northern basins previously deleted from the sale (46 Fed. Reg. 12436 (1981)). Interior again sought Governor Brown's recommendations pursuant to Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345 (Pet. App. 10a).

Reaction from the state was swift. On March 31, 1981, the California Coastal Commission resolved that leasing in the four northern basins would be inconsistent with the state's management program (J.A. 113). The commission declared that leasing the 31 northern tracts in the Santa Maria Basin was inconsistent with state law: "even if Interior issues a determination of consistency as the law requires, the proposed decision is *not* consistent with the [California Coastal Management Program] to the maximum extent practicable" (*ibid.*). The commission also asserted that leasing the disputed tracts in the Santa Maria Basin was contrary to the "national interest" (*id.* at 130).[12] By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning revised Lease Sale No. 53. The governor renewed his objections to leasing of the four northern tracts, and reiterated his position that the northern 34 tracts in the Santa Maria Basin should be excluded from the sale.

On April 10, 1981, the Secretary announced that Lease Sale No. 53 would go forward as to the 115 Santa Maria Basin tracts. The governor's recommendation that the northern 34 tracts be deleted from the sale was rejected because it did not provide a reasonable balance between the national interest and the well-being of the citizens

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[12] In response to the commission's resolution, Interior again explained that Lease Sale No. 53 did not "directly affect" the coastal zone within the meaning of Section 307(c)(1) of the CZMA (J.A. 133-134). The department, however, assured the

of California (J.A. 136). 43 U.S.C. (Supp. V) 1345(d).[13] The Secretary, however, delayed the offering of tracts in the four northern basins to permit a full examination of the governor's recommendation.[14] Accordingly, on April 27, 1981, Interior issued a final notice of sale, soliciting bids on all Santa Maria Basin tracts and establishing May 28, 1981, as the date of the lease sale (46 Fed. Reg. 23674).[15]

3. On April 29, 1981, the State of California filed suit seeking to enjoin the sale of 29 tracts in the northern portion of the Santa Maria Basin. A group of environmental organizations, led by the Natural Resources Defense Council, Inc., filed a substantially identical suit. The complaints alleged that the Department of the Interior had violated Section 307(c)(1) of the CZMA by failing to prepare a consistency determination for Lease Sale No. 53. Plaintiffs also asserted that the sale of the northern 29 tracts would be inconsistent with the state's coastal zone management program because of the possible effects of oil development activities on the sea otter.[16]

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coastal commission that its views would be considered by the Secretary (*id.* at 134).

[13] The Secretary's decision to reject the governor's recommendations made under Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345, was upheld by the district court (Pet. App. 69a-70a) and the court of appeals (*id.* at 28a-29a).

[14] On August 7, 1981, the Secretary announced that the four northern basins would be officially removed from Lease Sale No. 53.

[15] Interior consolidated several of the tracts before issuing the final notice of sale. Thus, although the area offered remained the same, the number of tracts declined from 115 to 111. The number of tracts objected to by the coastal commission changed from 31 to 29, and the tracts that were the subject of the governor's recommendation declined from 34 to 32. See generally Pet. App. 10a.

[16] California's suit also claimed violations of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345; the Endangered Species Act of 1973, 16 U.S.C. (& Supp. V) 1531 *et seq.*; and the Marine Mammal Protection Act of 1972, 16 U.S.C. (& Supp. V) 1361 *et seq.* The environmental groups' complaint also contained these

The federal government contended that it was not in violation of its obligations under Section 307(c)(1) of the CZMA because Lease Sale No. 53 did not come within the terms of the statute. The government relied upon former Secretary Andrus' administrative determination, reaffirmed by Secretary Watt, that the lease sale had no "direct effects" on California's coastal zone (Pet. App. 10a). The potential effects of exploration, development and production activities on the OCS are not "direct" effects of the decision to conduct an OCS lease sale, the government argued, because those effects are the result of activities subsequent to the lease sale that are themselves subject to the consistency certification procedures of Section 307(c)(3)(B) of the CZMA.

On August 18, 1981, the district court entered summary judgment (Pet. App. 79a-81a) for California and the intervening local governments on their CZMA claim. The court ruled (*id.* at 62a-65a) that OCS Lease Sale No. 53 directly affected the coastal zone and the Secretary erred in not providing California with a consistency determination.[17] The court found that leasing directly affects the coastal zone because "leasing sets in motion the entire chain of events which culminates in oil and gas development" (*id.* at 46a). In the district

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allegations. The district court resolved these issues in the government's favor (Pet. App. 65a-78a). The court of appeals affirmed (*id.* at 25a-30a).

[17] The district court ruled that the environmental organizations "had no implied right of action to bring claims under the CZMA" (Pet. App. 30a). On appeal, the court of appeals reversed, holding that such organizations had standing under Section 10(a) of the Administrative Procedure Act, now 5 U.S.C. 702 (Pet. App. 31a). We did not raise standing as a separate issue in our petition because, as to this lease sale, the claims of the state and the environmental groups coincide. Because the state clearly has standing to pursue these issues, no live standing issue is presented. See *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981). We reserve the right to challenge the standing of non-governmental entities, including environmental organizations, in future CZMA cases.

court's view, the "direct effects" of a lease sale include all the potential activities that might take place during the later stages of the OCS oil and gas process. The court concluded that all the possible effects on the coastal zone listed in the environmental impact statement and the Secretarial Issue Document ("SID") prepared in conjunction with the lease sale were direct effects of the decision to lease (*id.* at 63a-65a). The district court therefore held that the tracts disputed by the state could not be leased until the Secretary prepared a consistency determination addressing the steps taken by him to insure that the sale would be consistent with the state's coastal management program.[18]

The Ninth Circuit affirmed (Pet. App. 82a). It ruled that an OCS lease sale directly affects the coastal zone within the meaning of Section 307(c)(1) of the CZMA because it establishes "the basic scope and charter for subsequent development and production" (Pet. App. 13a). To support this conclusion, the court of appeals adopted the district court's entire list of effects extracted from the EIS and SID prepared for Lease Sale No. 53 (*id.* at 12a-13a). The court of appeals reasoned that California's expansive interpretation of Section 307(c)(1)'s "directly affecting" threshold standard served the purposes of the Act better than the government's "narrow definition" because an OCS lease sale is "the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased" (Pet. App. 13a). Accordingly, it held that the Secretary of the Interior is required to prepare a consistency determination addressing all potential exploration, development and production activities prior to conducting an OCS lease sale.

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[18] The district court's injunction also declared that the bids received on the disputed tracts were "null and void" (Pet. App. 80a). The injunction was stayed pending appeal, and was ultimately modified by the court of appeals. As modified, the portion of the district court's order that voids the bids on the disputed tracts is stayed pending the preparation of a consistency determination by the Secretary of the Interior (*id.* at 24a).

## SUMMARY OF ARGUMENT

1. Section 307(c)(1) imposes a consistency obligation only on federal activities "directly affecting" the coastal zone. The lower courts' conclusion that consistency review at the lease sale stage must encompass all potential impacts that might be hypothesized during the life of the entire OCS oil and gas process effectively amends the statute by deleting the "directly affecting" limitation. The possible future effects on the coastal zone of OCS exploration, development and production activities are not direct effects of the leasing decision because they are preceded by separate federal approvals that include CZMA consistency reviews.

An expansive construction of Section 307(c)(1) not only disregards the plain terms of the statute, it also conflicts with the legislative history of the section and upsets the proper federal-state coordination of the CZMA. The "directly affecting" threshold of Section 307(c)(1) was not drafted, as the court of appeals concluded (Pet. App. 14a), to expand the federal government's consistency obligations, but rather was the result of a congressional compromise designed to restrict the federal government's consistency obligations on federally owned lands within the physical confines of a state's coastal zone. The lower court's decision, therefore, takes a limitation that was designed to restrict federal consistency obligations within the coastal zone and recasts it as a broad expansion of federal consistency obligations for activities outside the coastal zone. Such an unforeseen result renders past federal input into approved state management programs superfluous, in clear disregard of the preapproval comment scheme designed by Congress to balance state and federal interests during the development of state management programs. The decision, moreover, unduly expands the states' substantive control over energy development activities on the OCS. Congress did not intend Section 307(c)(1) to grant the states a veto over the issuance of an OCS lease.

2. The lower courts' deletion of the term "directly" from Section 307(c)(1) disregards the decisionmaking regime painstakingly constructed by Congress for the development of resources on the outer continental shelf. In the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA, Congress recognized that there was insufficient information available at the outset of the OCS oil and gas process to properly balance environmental concerns against the nation's need for additional domestic energy resources. Congress therefore adopted a phased decisionmaking scheme whereby the decision to issue an OCS lease was separated from the later decisions to permit exploration, development and production activities. To avoid the making of any irretrievable commitment during the OCS oil and gas process, the Secretary was invested with broad powers to modify, suspend or even cancel leases at each stage of the process. By means of this regime, decisions regarding the risks and benefits of each stage in the OCS process are made at a time when there is optimal information available to assess adequately all available alternatives.

The task of integrating the consistency obligations of the CZMA into this decisionmaking regime is not difficult, inasmuch as Congress has addressed the question explicitly. In 1976, Congress rejected attempts to subject the issuance of an OCS lease to CZMA consistency requirements precisely because there was insufficient information available at that stage to assess whether possible future activities on the outer continental shelf would indeed be consistent with state management plans. Instead, Congress subjected the specific later exploration and production stages of the OCS development process to CZMA consistency review, thereby assuring that substantive consistency determinations will be made at a time when the actual impact of OCS development on the coastal zone can be accurately determined.

3. Limiting Section 307(c)(1) to federal activities that directly affect the coastal zone fully implements the

congressional objectives behind the CZMA. Contrary to the assumption of the court of appeals (Pet. App. 14a), the CZMA is not procedural in nature, nor is it designed primarily to facilitate yet another review of environmental factors, such as the one provided for by the National Environmental Policy Act. Rather, the CZMA is aimed at achieving substantive compliance, to the maximum extent practicable, with state coastal management programs. By requiring the government to make a substantive consistency determination at the very outset of the OCS oil and gas process, the decision below actually undermines this basic goal of the CZMA because there is simply insufficient information available at that stage to guarantee that all subsequent activities on the OCS will, in fact, be consistent with the state program.

Delaying CZMA consistency review to the later stages of the OCS development process, as Congress expressly provided in the 1976 amendments to the CZMA, assures the states that substantive consistency review will be made at a time when there is sufficient information to predict intelligently the impact that proposed activities might have on the coastal zone. Should a conflict with a state management program arise at these later stages, the state possesses adequate authority to prevent those activities from occurring. On the other hand, if CZMA consistency review is imposed on the issuance of an OCS lease, the national interest in full development of energy resources on the outer continental shelf may be thwarted, because the Secretary of the Interior may be precluded from issuing OCS leases on the basis of erroneous assumptions regarding the impact of hypothetical future activities on the OCS. Thus, restoring the statutory term "directly" to Section 307(c)(1) furthers the national interest in the expedited development of vital resources on the outer continental shelf without impinging upon the states' interest in the preservation, protection and development of the coastal zone.

## ARGUMENT

In this statutory interpretation controversy, the parties have employed widely divergent approaches to ascertain the meaning of the threshold standard for federal consistency contained in Section 307(c)(1) of the Coastal Zone Management Act of 1972. The United States' position is grounded firmly on the plain meaning of the statute and gives effect to every word contained in that provision. Our interpretation of Section 307(c)(1), moreover, is supported by its legislative history and a functional analysis of how Congress intended the CZMA to operate. Equally important, our position harmonizes with the action of Congress in amending the Coastal Zone Management Act in 1976 and the Outer Continental Shelf Lands Act in 1978. By according Section 307(c)(1) its plain meaning, it is possible to integrate the Coastal Zone Management Act of 1972 into the unique decisionmaking process Congress created for oil and gas activities on the outer continental shelf, without derogating from the legislative policies underlying either the CZMA or the OCSLA.

### I. SECTION 307(c)(1) LIMITS CONSISTENCY OBLIGATIONS TO THOSE FEDERAL ACTIVITIES THAT HAVE A DIRECT, IDENTIFIABLE IMPACT ON THE COASTAL ZONE

Section 307(c)(1) of the CZMA imposes consistency obligations only upon those federal actions "directly affecting the coastal zone." The decision of the court of appeals, however, subjects all OCS lease sales to the consistency provisions of Section 307(c)(1) notwithstanding the fact that the potential impacts of lease sales on a state's coastal zone are speculative, remote, and subject to further consistency review under Section 307(c)(3) of the Act. The court, in short, has accorded no meaning to the statutory term "directly." The court of appeals' construction of Section 307(c)(1) does not comport with the plain terms of the statute or its legislative history, and improperly alters the federal-state administration of the CZMA.

A. By its terms, the consistency requirement of Section 307(c)(1) comes into play only when federal activities *directly* affect a coastal zone. An OCS lease sale does not directly affect the coastal zone because it does not authorize any activities that, prior to further federal approval and review, will have a physical impact upon that zone. An OCS lease, moreover, specifically imposes a duty on the lessee to obtain state approval of any significant future activity that might impact the coastal zone. 43 U.S.C. (Supp. V) 1340(c), 1351(d). Thus, contrary to the decision below, the potential impacts upon a coastal zone attributable to the exploration, development or production stages of the OCS oil and gas process are not direct effects of a decision to conduct a lease sale. These potential impacts are, rather, the direct result of later federal approvals that can only be given following CZMA consistency review. 43 U.S.C. (Supp. V) 1340(c), 1351(d).

This Court recently rejected the contention that the statutory term "directly" has no "substantive effect" on the interpretation of a federal statute. *Bowsher* v. *Merck & Co.*, No. 81-1273 (Apr. 19, 1983), slip op. 8. To accept the contention that the term "directly" has no impact on the construction of a statute, the Court wrote, "would contradict the settled principle of statutory construction that we must give effect, if possible, to every word of the statute" (*ibid.*). In contravention of this "settled principle," however, the courts below simply ignored the term "directly" in Section 307(c)(1) of the CZMA.

Rather than address the plain import of the language of Section 307(c)(1), the district court dismissed the government's appeal to plain meaning as a "subterfuge" (Pet. App. 59a), and the court of appeals maligned the possible validity of a "narrow definition" (*id.* at 13a). But, despite the lower courts' attempts to avoid the issue, the fact remains that any conventional construction of the term "directly" is at odds with the conclusion of both courts. "The word 'direct' implies that the activity or

condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 307 (1936). See also *Webster's Third New International Dictionary Unabridged* 640 (3d ed. 1971) (without any "intervening agency, instrumentality, or influence").

Far from having a proximate impact on the coastal zone, an OCS lease sale is "only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to * * * each [successive stage]." *North Slope Borough* v. *Andrus*, 642 F.2d 589, 593 (D.C. Cir. 1980) (emphasis omitted). While the possible impacts of exploration and production may be hypothesized at the lease sale stage, these potential effects are remote in time from the OCS lease sale and depend upon the discovery of oil or gas on the lease site. Equally important, these effects do not stem from the issuance of a lease, but from subsequent federal approval of exploration, development and production plans. Such approval, moreover, is expressly conditioned upon a state's concurrence with the consistency certification submitted by the lessee. 16 U.S.C. (& Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. V) 1340(c), 1351(d). Therefore, the effects of an OCS lease sale on the coastal zone, including the ones noted by the courts below (Pet. App. 12a-13a, 62a-65a), are rather clearly "indirect," and the plain import of Section 307(c)(1) requires reversal of the court of appeals.[19]

B. The legislative history of Section 307(c)(1) also contradicts the court of appeals' conclusion that the statute generally applies to OCS lease sales. Indeed, the legis-

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[19] This conclusion comports with regulatory language developed under the National Environmental Policy Act of 1969. NEPA regulations define "direct effects" as those "which are caused by the action and occur at the same place and time," while "indirect effects" are those "reasonably foreseeable" effects that are "caused by the action" but "are later in time or farther removed in distance." 40 C.F.R. 1508.8.

lative history demonstrates that Congress drafted Section 307(c)(1) in an effort to restrict the federal government's consistency obligations for activities conducted within the physical confines of the coastal zone. It would be ironic to conclude that these efforts resulted in a marked expansion of the government's consistency obligations for activities undertaken outside the boundaries of the coastal zone.

When the CZMA was originally drafted in 1972, Congress focused primarily upon whether federal property physically located in the coastal zone—such as parks and military installations—should be subject to state coastal zone management programs. The bill passed by the Senate excluded federal property from the definition of the "coastal zone." S. Rep. No. 92-753, 92d Cong., 2d Sess. 8-9, 45 (1972). The House bill, by contrast, included federal property within the "coastal zone" definition. H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 2 (1972). Both bills, however, imposed consistency requirements only on federal activities "in" the coastal zone. H.R. Rep. No. 92-1049, *supra*, at 5; S. Rep. No. 92-753, *supra*, at 54. Thus, the House bill would have required consistency for *all* federal activities on federal lands located in the coastal zone; the Senate bill would have exempted government activities on federal lands from such a requirement. The conference committee created a compromise provision: it excluded federal lands from inclusion in the actual coastal zone, but provided that consistency would be required for those activities conducted on federal lands that "directly affect[]" the coastal zone. See H.R. Conf. Rep. No. 92-1544, 92d Cong., 2d Sess. 12 (1972) *reprinted in* Congressional Research Service, Library of Congress, 94th Cong., 2d Sess., *Legislative History of the Coastal Zone Management Act of 1972, as Amended in 1974 and 1976*, at 454 (Comm. Print 1976) (hereinafter *"CZMA Legis. Hist."*).

**Although there is no explicit legislative history to explain the congressional intent behind this compromise,**

it is evident that Section 307(c)(1) was drafted to serve a limiting function: to identify those activities on federal lands within the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements. Thus, contrary to the court of appeals' conclusion that Section 307(c)(1) was drafted to expand the consistency obligations of the federal government (Pet. App. 14a), the "directly affecting" threshold of the legislation was plainly designed to narrow the federal government's consistency obligations for activities conducted on federal lands within the boundaries of a state's coastal zone. And, a fortiori, that standard also limits the consistency obligations of the government for actions—such as OCS oil and gas leasing—that take place outside the coastal zone. The holding below that Section 307(c)(1) broadly expands the government's obligations outside the coastal zone, therefore, takes a limitation that was designed to restrict the government's obligations within the coastal zone and turns it inside out.[20]

C. The court of appeals' decision not only conflicts with the plain meaning and legislative history of Section 307(c)(1), it also jeopardizes the federal-state administration of the CZMA. The court's deletion of "directly

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[20] In enacting the Coastal Zone Management Act in 1972, Congress did not devote any detailed attention to the interrelationship between activities on the OCS and the proposed creation of state coastal zone management programs. However, attempts in both the Senate, see 118 Cong. Rec. 14183 (1972), and the House, see H.R. 14146, 94th Cong., 2d Sess. § 313 (1972), *reprinted in CZMA Legis. Hist., supra*, at 398, to extend the legislation beyond the territorial sea on the outer continental shelf were repulsed. The reason stated by the conference committee for declining to adopt an extension of the CZMA to the OCS was that it "would create potential conflicts with legislation already in existence concerning Continental Shelf Resources." H.R. Conf. Rep. No. 92-1544, *supra*, at 12. It is quite clear, therefore, that Congress in 1972 did not anticipate that the CZMA and its consistency requirements would have a substantial impact on federal activities on the OCS.

affecting" from Section 307(c)(1) negates, in large measure, the congressionally mandated preapproval procedure for state management programs and erroneously shifts the responsibility for controlling the development of resources on the outer continental shelf from the federal government to the states.

Because the federal government must comply with the substantive provisions of an approved state management program once the Section 307(c)(1) threshold has been crossed, federal agencies closely review and comment upon proposed state coastal zone management programs prior to their approval by the Secretary of Commerce. 16 U.S.C. 1456(a) and (b). Through this process, Congress anticipated that any aspect of a state's coastal zone program that was deemed to be impracticable by federal agencies would be "iron[ed] out" prior to approval. H.R. Rep. No. 92-1049, *supra*, at 20. A federal agency, however, cannot intelligently assess a proposed state management plan unless it knows which of its activities will be implicated by the state program, and the decision below effectively eliminates this guidance. The plain language of Section 307(c)(1) permits a federal agency to determine which of its activities will fall within the sweeping normative statements of a proposed plan: a state management program will affect only those federal activities that have a clear, immediate and identifiable impact on the coastal zone. But, under the approach of the court of appeals, federal activities come within a state coastal management plan so long as any possible impact on the coastal zone can be hypothesized. The result is that the congressionally ordained balancing of federal and state interests prior to approval of a state plan is thrown seriously out of kilter.[21]

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[21] The court of appeals' elevation of hypothetical impacts to the status of "direct effects" renders such a broad range of federal activities subject to the consistency requirements of Section 307(c)(1) that any "ironing out" of federal-state disagreements

Another troubling aspect of the decision below is that it gives coastal states undue authority over federal oil and gas activities on the outer continental shelf long before sufficient information is available to determine whether any particular OCS activity actually may be inconsistent with a state's coastal zone management program. Although California has consistently argued that application of Section 307(c)(1) to OCS lease sales merely furthers "intergovernmental coordination" (Resp. Br. in Opp. 17), the fact remains that the consistency requirements of that section are substantive, not procedural, in nature. Thus, far from simply "encourag[ing] cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone" (Pet. App. 14a), Section 307(c)(1), as construed by the court below, gives California a potential veto over a broad range of federal activities on the OCS not previously considered to be within the reach of state control.

Congress has "emphatically implemented its view that the United States has paramount rights to the seabed beyond" the limits of the territorial sea. *United States* v. *Maine*, 420 U.S. 515, 526 (1975). Both the Submerged Lands Act, 43 U.S.C. 1302, and the OCSLA, 43 U.S.C. (Supp. V) 1332(1), declare that the natural resources of the outer continental shelf "appertain" to the United States and are subject to its "jurisdiction and control." See also *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). Section 307(e) of the CZMA, 16 U.S.C. 1456(e), explicitly states that the Act does not diminish federal jurisdiction over submerged lands, and Congress has recently emphasized that

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**on future state management programs may well be impossible. The decision, moreover, renders past federal agency input into approved management programs largely superfluous: the examining agencies plainly did not assume that a proposed state plan would control any federal activity possessing a foreseeable, albeit tenuous, link to the coastal zone.**

the states do not possess "a veto power over OCS oil and gas activities" (S. Rep. No. 95-284, 95th Cong., 1st Sess. 78 (1977)). It is pellucidly clear, therefore, that the CZMA has not, sub silentio, altered or diminished the federal government's dominant role in determining which areas of the OCS should be offered for lease and when. As noted above (page 24, *supra*), the "directly affecting" standard of Section 307(c)(1) was designed to limit the federal government's consistency obligations on federal lands physically located within a state's coastal zone—it was not drafted to grant the states substantive control over federal actions on the outer continental shelf.

## II. THE DECISION BELOW RUNS CONTRARY TO A CAREFULLY CRAFTED LEGISLATIVE SCHEME THAT FULLY INTEGRATES THE CZMA INTO THE OCS OIL AND GAS PROCESS

Following the enactment of the CZMA in 1972, the Arab oil embargo of 1973 precipitated renewed congressional action concerning the CZMA and the OCSLA. As the Court has previously recognized, "[d]uring the mid-1970's, the Nation's increasing dependence on imported oil focused public attention on the OCS as a potential source of domestic petroleum and natural gas." *Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 154 (1981). The 94th Congress therefore considered proposals to amend both the CZMA and the OCSLA to respond to the demands of an expedited oil and gas leasing program on the OCS. These proposals were considered to be so interrelated that the concerned Senate committees held joint hearings on the proposed amendments to both statutes. *Joint Hearings on S. Res. 45 and S. Res. 222 Before the Senate Comms. on Interior and Insular Affairs, and Commerce*, 94th Cong., 1st Sess. (1975). See *CZMA Legis. Hist.*, *supra*, at 579. Only the amendments to the CZMA reached enactment in the 94th Congress, but, by 1976, the basic features of the OCSLA amendments as they were eventually enacted

in 1978 had also been formulated. Accordingly, the 1976 amendments to the CZMA were designed to mesh with the decisionmaking structure being created for the oil and gas program on the OCS, and the amendments to the OCSLA, in turn, contained coordinating provisions to ensure the effectiveness of the CZMA consistency regime. The court of appeals' decision, however, ignores this congressional prescription for application of the CZMA to the OCS oil and gas process.

A. In 1978, the Outer Continental Shelf Lands Act was substantially rewritten by Congress to promote " 'the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf.' " *Watt* v. *Energy Action Educational Foundation*, *supra*, 454 U.S. at 154 n.2, quoting H.R. Rep. No. 95-590, *supra*, at 53. In that measure, Congress recognized that the OCS oil and gas program is a unique federal undertaking because neither the government, the industry, nor the states can determine, at the outset, what actual oil and gas production activities (such as the placement of platforms and pipelines or the utilization of tankers) will eventually take place on the OCS. Unlike the case of a dam, road, or waterway project, the final contours of the completed activity cannot be predicted until the leasing and exploration processes are well under way. See *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980). Plainly put, the ultimate effects of issuing an OCS oil and gas lease depend not upon the contours of the lease sale but on the type, quantity and location of commercially valuable hydrocarbon resources discovered through exploration. Accordingly, Congress created a specially tailored federal decisionmaking regime by dividing the OCS process into separate and discrete stages. Under this system of phased decisionmaking, the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed at the later exploration or development and production stages.

Under the amended OCSLA, a lease does not directly authorize the lessee to explore for, develop or produce oil or gas. To engage in these activities, the lessee must seek separate federal approvals, first to explore for oil and gas and later to develop and produce the resource. 43 U.S.C. (Supp. V) 1340, 1351. As restricted by the OCSLA, a lease is a property interest that entitles the holder only to conduct certain preliminary surveys prior to submitting an exploration plan for approval (43 U.S.C. (Supp. V) 1340(c)(1); 30 C.F.R. 250.34-1). The "direct" effects of a lease sale, therefore, are extremely limited, and, by the express scheme of the statute, do not include the effects of potential exploration, development and production activities for which the lessee may eventually obtain approval.[22]

The final House report on the 1978 amendments explained the purpose behind prescribing this staged method of federal decisionmaking (H.R. Rep. No. 95-590, *supra*, at 164 (footnote omitted)):

> Section 25 is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.

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[22] Other courts have recognized the limited nature of the lease sale decision, and have accordingly molded the obligations of other generally applicable procedural and substantive federal laws to the OCS process. *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (NEPA does not require speculation regarding pipeline routes at the leasing stage of the OCS development process); *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (Endangered Species Act of 1973); *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979) (NEPA). As the District of Columbia Circuit noted, "[m]andatory stage-by-stage review prevents the telescoping of any and every projected hazard to * * * the environment into one overwhelming statutory obstacle. The OCSLA standards are not less strict, they simply rely more on achieving compliance than on exacting proscription." *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 600.

> The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds oil and gas. The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known. In fact, the failure to have this procedure has led, in part, at least one court to invalidate an entire lease sale.

See also S. Rep. No. 95-284, 95th Cong., 1st Sess. 45 (1977). Thus, Congress dealt with the problem of incomplete information regarding OCS resources and the "onshore and environmental impacts of production activity" by altering the structure of federal decisionmaking. Rather than confronting every possible question regarding production at the lease sale stage, decisions would be made at later, specifically identified stages, when the maximum amount of information would be available.

Congress, moreover, added provisions to the OCSLA to insure that the Secretary could make meaningful decisions at the post-lease sale stages of the OCS process. The amendments authorized the Secretary to suspend operations or deny approval of exploration or development and production plans if sensitive environmental or coastal resources are endangered, see 43 U.S.C. (Supp. V) 1334(a)(1), 1340(c)(1), 1351(h)(1)(D); to extend the term of lease if these dangers may be mitigated over time, 43 U.S.C. (Supp. V) 1334(a)(2)(B), 1340 (c)(1), 1351(h)(2)(B); and to cancel leases if the dangers may not be resolved, 43 U.S.C. (Supp. V) 1344(a)(2). These provisions of the OCSLA specifically apply to a lessee's failure to satisfy the consistency requirements imposed by the 1976 amendments to the CZMA. 43 U.S.C. (Supp. V) 1351(h)(1)(B), (2)(A) and (B). It is to those amendments that we now turn.

B. As stated above, Congress initiated efforts to amend the CZMA in conjunction with proposals to amend the OCSLA. The 1976 amendments to the CZMA were designed to "address[] a need not foreseen in the 1972 legislation—that of energy development on the Outer Continental Shelf * * *" (122 Cong. Rec. 6109 (1976) (remarks of Rep. Lent)). And, while Congress initially proposed consistency review at the lease sale stage of the OCS process, it ultimately rejected that approach in favor of a phased system compatible with the structure of decisionmaking under the OCSLA itself.

Bills introduced in both the House and the Senate in 1975 proposed modifying Section 307(c)(3) of the CZMA by inserting the word "lease" into the statutory term "license or permit," and adding Section 307(c)(4), which would have required an applicant for an OCS lease to certify consistency with a state management program if its activities "directly or indirectly affect[ed] the coastal zone." H.R. 3981, 94th Cong., 1st Sess. 3 (1975), *reprinted in CZMA Legis. Hist.*, *supra*, at 801; S. 586, 94th Cong., 1st Sess. 3 (1975), *reprinted in CZMA Legis. Hist.*, *supra*, at 605. The bills that were reported out of committees in both Houses eliminated Section 307(c)(4), but retained the proposal to insert the term "lease" into Section 307(c)(3). S. Rep. No. 94-277, 94th Cong., 1st Sess. 59 (1975); H.R. Rep. No. 94-878, 94th Cong., 2d Sess. 4 (1976). The Senate report stated that the addition of the term "lease" to Section 307(c)(3) would mean:

> [i]n practical terms * * * that the Secretary of the Interior would need to seek the certification of consistency from adjacent state governors before entering into a binding lease agreement with private oil companies.

S. Rep. No. 94-277, *supra*, at 19-20. The amendment of Section 307(c)(3), as proposed, was adopted by the Senate. 121 Cong. Rec. 23085-23086 (1975).

The Executive Branch, however, opposed the proposed amendment of Section 307(c)(3) on the same ground

that eventually persuaded Congress to adopt a phased decisionmaking procedure in the 1978 amendments to the OCSLA: lack of information at the lease sale stage of the OCS development process. As an official of the Department of the Interior testified before the House committee that was considering the amendment (*Coastal Zone Management: Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess., Pt. 1, at 204 (1975) (statement of Royston C. Hughes, Assistant Secretary of the Interior)):

> Our concern is that people may construe this as a requirement that the lease applicant prove Federal consistency before he is physically able to do it. If he does not know what he is going to find out there and has no way of quantifying what he intends to bring ashore, there may be, if this requirement is placed in amendment to the Coastal Zone Management Act, a legal bar to us issuing a lease. It is like a chicken-and-egg situation, from ou[r] point of view.

While the committee reported the amendment favorably (see H.R. Rep. No. 94-878, *supra*, at 52-53), it was deleted on the floor of the House. 122 Cong. Rec. 6128 (1976). The sponsor of the floor action, Representative Dupont, explained that "existing law" (*i.e.*, Section 307 (c)(3)) required consistency compliance whenever "a permit or license is granted by the Federal Government to perform offshore drilling." 122 Cong. Rec. 6128 (1976). The committee bill would "bring the leasing of offshore oil sections within the same framework." *Ibid.* But, because it was not "quite clear as to what effect that would really have on offshore oil tract leasing procedures," he urged the House to delete the amendment to allow the conference committee to study the matter further. *Ibid.*[23]

[23] In Representative Dupont's words, deletion would provide "a little bit of flexibility in the conference to either adopt the language as the Senate put it in or adopt some other language we feel would

As is evident, the focus of this discussion rested solely on whether the consistency requirements of Section 307(c)(3) should be applied to the leasing stage. No one suggested that the consistency provisions of Section 307(c)(1) applied to lease sales or that insertion of the term "lease" into Section 307(c)(3) might be redundant or duplicative of the Section 307(c)(1) requirement.[24]

The conference committee, after further study, did not restore the proposed language to Section 307(c)(3). Instead, it created a new subsection to that provision that required lessees seeking federal approval of exploration, development and production plans to first comply with CZMA consistency certification requirements. Section 307(c)(3)(B), 16 U.S.C. (& Supp. V) 1456(c)(3)(B). The conference report explained the legislative intent behind this action (S. Conf. Rep. No. 94-987, 94th Cong., 2d Sess. 30 (1976); H.R. Rep. No. 94-1298, 94th Cong., 2d Sess. 30 (1976)):

> The conference substitute * * * specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. The provision will satisfy state needs for complete information, on a timely basis, about the details of the oil industry's offshore plans.

The conference substitute was enacted by Congress as a special consistency provision for oil and gas leases on the OCS. 16 U.S.C. (& Supp. V) 1456(c)(3)(B). This special provision, moreover, was subsequently integrated into the 1978 amendments to the OCSLA, 43

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be more beneficial and at the same time protect the rights of the States" (122 Cong. Rec. 6128 (1976)).

[24] Indeed, the prevailing view prior to the 1976 amendments was that Section 307(c)(3) alone applied to the issuance of OCS leases. See 122 Cong. Rec. 6128 (1976) (remarks of Rep. Murphy). See also Breeden, *Federalism and the Development of Outer Continental Shelf Mineral Resources*, 28 Stan. L. Rev. 1107, 1142 (1976).

U.S.C. (Supp. V) 1340(c)(2), 1351(d), 1351(h)(1)(B), and the legislative history of the 1978 OCSLA amendments reveals the care and attention with which Congress developed OCSLA provisions to fully integrate the two statutes.[25] Congress, therefore, spelled out in detail how the consistency procedures of the CZMA would be applied to the OCS process. Instead of explicitly subjecting potential exploration, development and production activities to consistency requirements at the lease sale stage, Congress conditioned those future activities on satisfaction of consistency requirements applied at the specific stages of the ongoing OCS oil and gas process.[26]

The 1976 amendments to the CZMA and the 1978 amendments to the OCSLA thus represent a congressional repudiation of the court of appeals' conclusion that all the potential effects of OCS lease sales are subject to CZMA consistency review at the lease sale stage. At first blush, the congressional committees in 1976 thought that consistency review at the OCS leasing stage was desirable. But, when acquainted with the practical consequences of such a requirement and the impossibility of satisfying it in a meaningful manner, Congress ultimately rejected

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[25] See, *e.g.*, H.R. Rep. No. 95-590, *supra*, at 168 ("[i]f a plan is disapproved because lessee cannot demonstrate compliance with * * * Federal 'consistency' requirements * * * the Secretary may cancel the lease"). See also S. Rep. No. 95-284, *supra*, at 83-84; H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 101, 118-119, 156 (1978). The conference report also rejected a consistency standard applicable to the five-year leasing program. *Id.* at 156. Instead, it required the Secretary to "consider" state coastal zone plans in creating the five-year program. *Id.* at 105.

[26] Indeed, the only hint that Congress contemplated that *any* consistency requirement would apply at the lease sale stage of the OCS oil and gas process appears in a footnote to the House report on the 1978 amendments to the OCSLA. There, without analysis, the report states that "under the [CZMA] * * * certain OCS activities including lease sales and approval of development and production plans must comply with 'consistency' requirements * * *." H.R. Rep. No. 95-590, *supra*, at 153 n.52.

that approach. Instead, it substituted special consistency requirements specifically designed to mesh with the structure of the forthcoming amendments to the OCSLA. 16 U.S.C. (& Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d). By expansively defining "directly affecting the coastal zone" and requiring a consistency determination at the leasing stage for potential OCS exploration, development and production activities, the court of appeals has adopted an approach that Congress expressly considered and rejected. The lower court's construction of Section 307(c)(1) is clearly a "creature of judicial cloth, not legislative cloth." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 141 (1981).

C. In the face of the clear legislative scheme outlined above, the State of California has been forced to rely upon a discarded administrative interpretation of Section 307(c)(1) and recent, post-enactment legislative reports to support its expansive reading of the term "directly affecting" (Resp. Br. in Opp. 22-23). But, in spite of the lower court's reliance on these sources (Pet. App. 15a-17a), they offer little support for California's construction of Section 307(c)(1).

1. The National Oceanic and Atmospheric Administration ("NOAA") within the Department of Commerce is the federal agency charged with the responsibility of promulgating regulations implementing the CZMA. See 16 U.S.C. 1463. In 1978, NOAA issued final regulations containing the agency's administrative interpretation of Section 307(c)(1).[27] 43 Fed. Reg. 10510 (1978). The regulations substituted the word "significantly" for the statutory term "directly," and in turn defined "signifi-

[27] In 1976, NOAA issued proposed regulations that did not address Section 307(c)(1)'s threshold test, on the premise that the term "directly affecting the coastal zone" could "speak for itself." 41 Fed. Reg. 42878, 42880. In 1977, the agency reversed itself and issued a second set of proposed regulations that defined "directly affecting" in terms of "primary, secondary, and cumulative impacts," as those terms were defined by the Council of Environmental Quality's NEPA guidelines. 42 Fed. Reg. 43586, 43590, 43598.

cantly" in terms of "primary, secondary and cumulative effects on the coastal zone." *Id.* at 10511, 10519. The regulations, however, did not expressly extend Section 307(c)(1) to OCS lease sales. Although the agency had been requested during the rulemaking proceeding to declare that the issuance of a federal lease was subject to CZMA consistency requirements,[28] the preamble to the regulations noted the existence of some uncertainty as to whether an OCS lease sale was a federal "activity" subject to the requirements of Section 307(c)(1).[29]

The Department of the Interior objected to NOAA's dilution of Section 307(c)(1)'s "directly affecting" threshold, and asserted that its pre-leasing activities were not subject to the consistency provisions of the CZMA. The Department of Justice's Office of Legal Counsel ("OLC") was ultimately engaged to resolve the inter-agency dispute between NOAA and Interior. OLC determined that, although Interior's pre-leasing activities could, under appropriate circumstances, fall within the terms of Section 307(c)(1), NOAA had impermissibly lowered the section's threshold (J.A. 45-46). OLC rejected NOAA's assertion that the legislative history of the CZMA was " 'replete' with statements that Congress intended to cover all Federal activities capable of significantly affecting the Coastal Zone" (*id.* at 46). The opinion noted that

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[28] Following the issuance of the 1976 proposed regulations, NOAA was asked to declare that the issuance of an OCS lease fell within the "license or permit" provisions of Section 307(c)(3)(A) of the CZMA, despite the fact that Congress had refused to mandate that result in the 1976 amendments to the CZMA. 42 Fed. Reg. 43591 (1977). The agency responded that it was "considering a position" which treats pre-leasing activities on the OCS as "federal activities" subject to Section 307(c)(1) of the Act. 42 Fed. Reg. 43591 (1977).

[29] Although the preamble to the 1978 regulations is not specific regarding the source of NOAA's uncertainty, other federal actions, such as the issuance of licenses, permits, and non-OCS leases, were deemed subject to Section 307(c)(3) and not Section 307(c)(1) by the regulations. 43 Fed. Reg. 10523 (1978).

Congress had provided discrete standards to trigger the Act's consistency obligations, and concluded that, in light of this fact, "we are unable to concur in an interpretation that would dilute 'directly,' first to 'significantly' and then to 'primarily, secondarily, and cumulatively'" (*id.* at 46). The opinion unequivocally declared that "the conformity requirement of § 307(c)(1) applies only to the preleasing activities of the Department of the Interior *directly* affecting the Coastal Zone" (*id.* at 47; emphasis added). As a result of the OLC opinion, the portions of the 1978 regulations that substituted "significantly" for "directly" in Section 307(c)(1) were withdrawn (44 Fed. Reg. 37142 (1979)).[30]

This administrative history establishes two important, interrelated propositions. First, the suggestion that an OCS lease sale, regardless of its actual impact on the coastal zone, falls within the terms of Section 307(c)(1) was first raised administratively after Congress, in 1976, had determined *not* to subject the issuance of an OCS lease to CZMA consistency requirements. See pages 32-36 & note 28, *supra*. Second, the regulations relied upon by California and the court below (Pet. App. 16a) do not in fact address whether an OCS lease sale is an activity "directly affecting the coastal zone" (16 U.S.C. 1456(c)(1)) because those regulations diluted the Section 307(c)(1) inquiry into the materially different question of whether an OCS lease sale had any "significance"

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[30] The OLC opinion did not attempt to specify those circumstances in which pre-leasing activities would fall within the terms of Section 307(c)(1). The opinion concluded that the "question whether [these] activities *or any of them* directly affect the Coastal Zone is essentially one of fact" (J.A. 47; emphasis added), which OLC was not authorized to address. Since the issuance of the OLC opinion, the Department of the Interior has reviewed each OCS lease sale to determine whether it authorizes any activities that, without further federal approval, will affect the coastal zone. No such direct effects have been found for Lease Sale No. 53, and Interior's "negative determination" has already been delivered to the State of California. See pages 11-12, *supra*.

for the coastal zone. Thus, there is no basis for according NOAA's discarded interpretation of Section 307(c)(1) any substantial weight because, as the court below noted, there is no reason to assume "that the regulation 'implement[s] the congressional mandate in some reasonable manner'" (Pet. App. 17a, quoting *United States* v. *Correll*, 389 U.S. 299, 307 (1967)).

2. California also relies on language from House and Senate reports on the 1980 amendments to the CZMA, and on a 1981 resolution of disapproval directed at NOAA's most recent attempt to interpret Section 307(c)(1), to support its contention that Lease Sale No. 53 directly affects its coastal zone (Resp. Br. in Opp. 22-23). These legislative materials, however, have little relevance to the proper interpretation of Section 307(c)(1).

Following the OLC opinion and the subsequent withdrawal of its original regulations, NOAA, pursuant to an interagency agreement, again commenced a rulemaking proceeding to define the "directly affecting" threshold of Section 307(c)(1). See 46 Fed. Reg. 26656, 26659 (1981). Because of this ongoing administrative procedure, Congress did not attempt to refine Section 307(c)(1) in the 1980 amendments to the CZMA.[31] Indeed, both the House and Senate reports on that legislation acknowledged that congressional action would be premature inasmuch as the forthcoming regulations would clarify the meaning of "directly affecting the coastal zone." H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 34 (1980); S. Rep. No. 96-783, 96th Cong., 2d Sess. 11 (1980). But, despite the fact that the 1980 legislation did not amend Section 307(c)(1), the House report contained language which suggested that the consistency obligation imposed by the section attached "whenever a Federal activity has a functional interrelationship from

[31] The 1980 amendments to the CZMA dealt primarily with reauthorization of the funding provisions of the CZMA. S. Rep. No. 96-783, 96th Cong., 2d Sess. 1 (1980).

an economic, geographic or social standpoint with a State coastal program's land or water use policies" or "when a Federal agency initiates a series of events of coastal management consequences" (H.R. Rep. No. 96-1012, *supra*, at 34).

Two weeks after this suit was filed, the long-awaited regulation defining Section 307(c)(1)'s "directly affecting" threshold was published for comment in the Federal Register. 46 Fed. Reg. 26658 (1981). In spite of the suggestions contained in the 1980 legislative reports, the regulation relied on the plain terms of Section 307(c)(1), as well as the 1976 and 1978 amendments to the CZMA and OCSLA, and provided that a federal activity directly affects the coastal zone if it "produces a measurable physical alteration in the coastal zone" or "initiates a chain of events reasonably certain to result in such alteration, without further required agency approval" (46 Fed. Reg. 26659-26660 (1981)). The proposed regulation was published in final form a few months thereafter (*id.* at 35253), but its existence was short lived. The 1980 amendments to the CZMA had added a "legislative veto" provision to the Act (16 U.S.C. (Supp. V) 1463a), and following the passage of a resolution of disapproval on a sharply divided 20-15 vote by the House Committee on Merchant Marine and Fisheries (H.R. Rep. No. 97-269, 97th Cong., 1st Sess. 8-9 (1981)), the regulation was withdrawn. 47 Fed. Reg. 4231 (1982).

The court of appeals accorded the legislative materials set out above "substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants" (Pet. App. 16a). The course of events in 1980 and 1981, however, suggests just the opposite conclusion. To pretend that the 1980 committee reports or the 1981 majority report on the resolution of disapproval contain any reliable expression of the 1972 congressional intent regarding the proper construction of Section 307(c)(1) is to blink at reality. Because the 1980 amendments to the

CZMA did not alter or re-enact the consistency provisions of Section 307, the language inserted in the 1980 committee reports was unrelated to the legislation then before Congress. The membership of the relevant congressional committees, moreover, had significantly changed between 1972, 1980, and 1981, and the later committees cannot be presumed to have any special knowledge of the intent behind the original legislation.[32] The views expressed in the reports, furthermore, are only those of the majority of the members sitting on the committees themselves; those views were never directly voted upon by either House of Congress. Indeed, when the chairman of the House subcommittee was queried about the language of the 1980 report on the floor of the House, he replied that it was not intended to "modify the term directly affecting" (126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980)).

This Court has often stated that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960); see also *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). This observation is especially apt here, where it is quite clear that the language of the 1980 and 1981 reports relied upon by the court below (Pet. App. 15a, 17a) represents " 'only the personal views of * * * legislators' " sitting on committees eight and nine years after Section 307(c)(1) was enacted. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974), quoting *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967); *TVA* v. *Hill*, 437 U.S. 153, 193 (1978). As the dissenting members of the

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[32] Of the members voting on the 1981 resolution of disapproval passed by the House Committee of Merchant Marine and Fisheries, for example, only six (of 35) sat on the committee in 1972, and five of these six original members voted *against* the resolution. Compare H.R. Rep. No. 97-269, 97th Cong., 1st Sess. 8 (1981) *with* 1971-1972 Cong. Index (CCH) 3417.

1981 disapproval resolution stated, the legislative materials relied upon by the court below are "inconsistent with the previous action of Congress" and "should be dismissed as the dicta they represent" (H.R. Rep. No. 97-269, *supra*, at 16, 17).[33]

## III. LIMITING SECTION 307(c)(1) TO ACTIVITIES THAT DIRECTLY AFFECT THE COASTAL ZONE FULLY IMPLEMENTS THE CONGRESSIONAL POLICIES BEHIND THE CZMA AND THE OCSLA

The court of appeals rejected the government's contention that Section 307(c)(1) "limits the scope of direct effects from a lease sale to those effects that 'are part of, or immediately authorized by, a lease sale'" (Pet. App. 12a) because, in the court's view, that "narrow definition" thwarts "a major purpose of the CZMA," *i.e.*, the involvement of the state "at an early stage of a significant and comprehensive activity * * * that will eventually have an appreciable impact on the coastal zone" (*id.* at 14a). The State of California has vigorously pursued this theme, suggesting that a prime goal of the CZMA is to encourage "intergovernmental coordination" (Resp. Br. in Opp. 17).

Despite its possible appeal on first glance, the lower court's construction of Section 307(c)(1) suffers from a

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[33] The dissenting members wrote that "the inclusion of all Federal OCS pre-leasing and leasing decisions in the consistency provisions of the CZMA is a reversal of Congress' earlier decisions during the 1976 amendments to that Act and the 1978 amendments to the Outer Continental Shelf Lands Act" (H.R. Rep. No. 97-269, *supra*, at 17). The dissenters noted that Congress, in considering the 1976 amendments to the CZMA, had deleted an amendment to Section 307(c)(3) of the Act "that would have specifically included all federal leasing activities in the consistency provisions of the Act," thereby "rejecting the notion that absolute consistency should apply in all cases during the planning for, and holding of, lease sales" (H.R. Rep. No. 97-269, *supra*, at 17). The dissenters concluded that the committee's disapproval of NOAA's attempt to confine Section 307(c)(1) to activities "directly affecting" the coastal zone "is completely contrary to these facts" (H.R. Rep. No. 97-269, *supra*, at 17).

fundamental—and fatal—defect: the immediate purpose of Section 307(c)(1)'s consistency requirement is not to provide coastal states with an opportunity to participate in the initial decisionmaking or planning stages of federal activities on the outer continental shelf. The states are provided ample involvement in these stages of the OCS oil and gas process by the express terms of the OCSLA, as the course of events in this case so vividly demonstrates. See pages 9-14, *supra*.[34] The CZMA is not, as California suggests (Resp. Br. in Opp. 15), simply another "environmental review statute[]." Far from merely facilitating consideration of environmental factors, the consistency provisions of the CZMA are designed to assure compliance, to the maximum extent practicable, with approved state coastal management programs. Thus, Section 307(c)(1) is concerned not with procedure, as the court of appeals assumed (Pet. App. 14a), but with substantive results.

Contrary to the conclusion of the court of appeals, limiting Section 307(c)(1) to activities that directly affect the coastal zone assures rather than defeats the congressional goal behind the consistency provisions of the CZMA. As noted above (page 7, *supra*), the issuance

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[34] California's contention (Resp. Br. in Opp. 17 n.27) that the lower court's construction of Section 307(c)(1) is necessary in order to give the state an opportunity to address its "broad[ ] concerns" regarding OCS oil and gas development is belied by the factual background of this case. As outlined in the statement (pages 9-14, *supra*), California has been provided with ample opportunity to express its concerns throughout the administrative preparation for Lease Sale No. 53. From the call for nominations through the drafting of the environmental impact statement and the requests for comments under Section 19 of the OCSLA, 43 U.S.C. (Supp. V) 1345, the state has repeatedly addressed "which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore construction should sensibly be located" (Resp. Br. in Opp. 17 n.27). It is plainly unnecessary to construe Section 307(c)(1) broadly simply to afford the state yet another opportunity to ventilate issues that have already been aired under the OCSLA and NEPA.

of an OCS lease authorizes only limited activities that, in general, will have no physical effect on the coastal zone. See 43 U.S.C. (Supp. V) 1340(b); 30 C.F.R. 250.34-1. In the usual OCS lease context, therefore, where the lease itself does not authorize activities with impacts reaching beyond the outer continental shelf, the CZMA consistency determination is deferred to a stage in the OCS oil and gas process when the actual effects of any exploratory or production activities on the coastal zone can be accurately assessed. 16 U.S.C. (& Supp. V) 1456(c)(3)(B); 43 U.S.C. (Supp. V) 1340(c)(2), 1351 (d); S. Conf. Rep. No. 94-987, *supra*, at 30; H.R. Rep. No. 94-1298, *supra*, at 30. In this manner, the state is guaranteed that all activities on the OCS will, in fact, be consistent with the state's approved management program. Moreover, the national interest in the full development of energy resources on the outer continental shelf is also furthered because the OCS development process is not stalled on the basis of premature and erroneous speculation regarding possible on-shore impacts of, as yet, uncertain future activities.

The lower court's deletion of the term "directly" from Section 307(c)(1) upsets this careful balance between state and national interests, and does so without furthering the primary goal of the CZMA: assuring consistency with approved state management programs. A consistency determination made at the very outset of the OCS oil and gas process cannot guarantee that all subsequent activities will indeed be consistent with a state management program because, as Congress specifically recognized in the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA (see pages 29-33, *supra*), it is impossible to fully evaluate the potential effects of exploration, development and production activities on the OCS prior to the lease sale. Among other uncertainties, the government does not know before a lease sale (1)

if specific tracts will actually attract bids;[35] (2) if bids are tendered, whether they will be accepted as representing the tracts' fair market value;[36] (3) if leases are issued, whether exploration plans will be presented for approval;[37] (4) if exploration plans are presented, what the content of those plans will be; (5) if exploration is approved, whether the lessees will invest in actual exploration activities;[38] (6) if exploration activities do take place, whether commercially recoverable accumulations of hydrocarbons will be discovered;[39] (7) if commercially valuable accumulations of hydrocarbons are discovered, what the type and quantity of these resources

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[35] In the 1954-1979 period, for example, only 46% of the tracts offered for sale actually received bids. Cabot Consulting Group, *DOE Contract No. DE-AC01-79RA85011, Competition on the Outer Continental Shelf and its Implications for Competition in Downstream Markets* 222 (July 14, 1980). In OCS Lease Sale No. 53, 81 of the 111 tracts offered received bids.

[36] Historically, only 41% of the tracts offered for lease actually result in leases. Cabot Consulting Group, *supra*.

[37] Depending upon a number of factors, including the bidding system used and the lessee's interest in other tracts in the area, a lessee may defer a decision on exploration pending the completion of preliminary testing on adjacent tracts. As a result of Lease Sale No. 42 in the North Atlantic, for example, 63 tracts were leased but only 26 exploration plans have been prepared. See *Conservation Law Foundation* v. *Watt*, 560 F. Supp. 561, 565 (D. Mass. 1983), appeal pending, No. 83-1258 (1st Cir.).

[38] While 26 exploration plans have been approved for the Sale 42 area, only eight exploration wells have been drilled. *Conservation Law Foundation* v. *Watt*, *supra*, 560 F. Supp. at 566.

[39] On the "frontier" areas of the OCS, exploration has to date been disappointing. The eight wells drilled in the Lease Sale No. 42 area were dry holes. *Conservation Law Foundation* v. *Watt*, *supra*, 560 F. Supp. at 566. No commercial quantities of oil or gas were found as a result of the MAFLA (Mississippi, Alabama, Florida) sale in the eastern Gulf of Mexico in 1972. See *Sierra Club* v. *Morton*, 510 F.2d 813 (5th Cir. 1975). Similar results were obtained from the Mid-Atlantic Baltimore Canyon sale considered in *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

will be;[40] and (8) if development and production plans are in fact submitted for approval, what the content of those plans will be. Faced with this series of sequential unknowns, the federal government simply cannot make a meaningful substantive determination at the lease sale stage that the coastal zone effects of all possible activities following the issuance of the lease will be consistent, to the maximum extent practicable, with a state's coastal zone management program.

In spite of the evident futility of making a substantive consistency determination at the outset of the OCS development process, California asserts (Resp. Br. in Opp. 16) that Section 307(c)(1) must apply to the issuance of a lease to assure "proper[] evaluat[ion]" of the "cumulative impacts of the oil and gas development which may occur under [an OCS lease]." This argument, however, again assumes that the CZMA plays a primarily procedural rather than substantive role. In the context of a procedural statute, such as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, an informed estimation of the possible impacts or effects of later occurring activities is altogether appropriate for the purpose of informing the decisionmaker of the potential consequences of his decision.[41] But, any attempt to satisfy a

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[40] The impacts of developing natural gas resources differ considerably from those associated with oil production. The quantity of the resources, furthermore, whether oil or gas, will dictate what transportation or processing facilities will be necessary.

[41] Indeed, the Environmental Impact Statements that are prepared in connection with all OCS lease sales perform the sort of analysis California asserts (Resp. Br. in Opp. 16) is necessary under the CZMA. A lease sale EIS projects a range of discoverable resource values, constructs hypothetical scenarios of the possible activities necessary to recover those resources (*e.g.*, the number and placement of pipelines, platforms, and tanker routes), and describes a variety of environmental impacts that might be associated with these hypothetical scenarios. See, *e.g.*, *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980) (NEPA requires a "hard look" at the environmental consequence of federal action but does not impose substantive limitations on that action); *Vermont*

substantive consistency limitation on future activities on the basis of speculation, like that contained in an EIS, will almost inevitably result in an erroneous decision.[42]

The present dispute between the State of California and the federal government illustrates this principle well. The California Coastal Commission objects to Interior's decision to lease 29 tracts in the Santa Maria Basin because, in its view, there is an unacceptably high risk that an oil spill on these tracts will adversely affect the nearby sea otter habitat. This conclusion, of course, ultimately depends upon two assumptions: (1) that there is oil in commercial quantities underlying those 29 tracts and (2) that the activities necessary to develop those tracts will result in an oil spill adversely affecting the sea otter. If, however, either of these assumptions is wrong, the state's consistency decision will also be erroneous. For example, if commercially valuable natural gas, but not oil, is discovered on those tracts, the perceived difficulty of an oil spill will not arise. Furthermore, even if a commercially valuable quantity of oil is discovered, it may be possible, based on the amount, type and location of the oil pool and the technology then available, to design a development plan that will reduce the risk of an oil spill to a level acceptable to the state. If such a plan is not possible, development may be deferred until conditions change, or, in the worst case, the lease may simply be cancelled. See 43 U.S.C. (Supp. V) 1351(h).[43]

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*Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 538 (1978) (same).

[42] For example, pre-sale resource estimates are "inherently speculative" (Pet. App. 27a). Prior to actual exploration, any estimate of the actual on-shore impact of developing those resources will, more likely than not, prove to be faulty, and any substantive decision based on that estimate will suffer from the same defect.

[43] The lower court's decision inexplicably requires the federal government to evaluate the impact of OCS development on the sea otter under the CZMA, even though other courts have recognized

Thus, California's determination that the offering of 29 tracts in the Santa Maria Basin is inconsistent with its coastal management program (J.A. 113) could well be erroneous. If so, the national interest in OCS development will be thwarted without reason, since the Secretary will be precluded from offering these tracts for lease.[44] On the other hand, deferring the CZMA consistency determination to the later stages of the OCS oil and gas process, when the direct impact of any development activities can be accurately assessed, fully protects the state's asserted interests in the coastal zone. If a genuine concern for the sea otter habitat, or any

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that such an evaluation is impossible under the Endangered Species Act of 1973. In conformity with the phased decisionmaking procedure applicable to the OCS development process, biological opinions prepared for OCS lease under the ESA generally reach conclusions regarding the likelihood of jeopardy only as to the lease sale and exploration stages. Decisions concerning the development and production stage are deferred until information gathered through exploration is available. The biological opinion prepared for Lease Sale No. 53, for example, addressed only lease sale and exploration activities, and called for further consultation prior to the development stage. C.R. 85; A.R. 182w, at 4. This manner of satisfying the obligations of the Endangered Species Act of 1973 has been approved by the lower federal courts. *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980). See also *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712 (1st Cir. 1979). Indeed, the district court below found that such phased compliance did not violate the ESA (Pet. App. 74a-75a), and the court recognized that it was requiring the United States to perform a task under the CZMA that was impossible or inappropriate under the ESA (Pet. App. 77a).

[44] In fiscal year 1982, the Secretary of the Interior accepted high bids totalling $3.171 billion from all OCS lease sales. Mineral Management Service, U.S. Dep't of Interior, *Outer Continental Shelf Oil and Gas Leasing and Production Program Annual Report: Fiscal Year 1982*, at 42. So far, the Secretary has accepted high bids totalling $6.882 billion from all offerings in fiscal year 1983. Mineral Management Service, U.S. Dep't of Interior, *OCS Lease Sale Statistics* (Draft July 1983). In Lease Sale No. 53 high bids totalling $2.038 billion were tendered. *Ibid.*

other coastal resource, materializes following the issuance of an OCS lease, both the federal government and the state retain ample power under Section 307(c)(3)(B) of the CZMA, 16 U.S.C. (& Supp. V) 1456(c)(3)(B), as incorporated by the relevant provisions of the OCSLA, 43 U.S.C. (Supp. V) 1340(c)(2), 1351(d), to prevent the objectionable activity from even occurring and thereby assure full protection of the coastal zone.

At bottom, California does not trust the congressional determination contained in the 1976 amendments to the CZMA and the 1978 amendments to the OCSLA that intelligent, responsible decisionmaking in the OCS context can be achieved only by deferring significant determinations until the necessary information for those decisions becomes available. See, H.R. Rep. No. 95-590, *supra*, at 164. But, as the District of Columbia Circuit has stated, the "congressional mandate establishes a clear program for thoughtful, graduated, and tightly controlled development of oil lands on the outer continental shelf of the United States." *North Slope Borough* v. *Andrus*, *supra*, 642 F.2d at 594. California's premature application of the consistency provisions of Section 307(c)(1) to an OCS lease sale runs contrary to this phased decisionmaking process so painstakingly constructed by Congress in 1976 and 1978, and does not, in the end, serve the underlying purpose of Section 307(c)(1); there is simply inadequate information at the lease sale stage to determine whether all future activities on the OCS will in fact be consistent with California's management program.

The United States' interpretation of Section 307(c)(1) assures full compliance with the consistency provisions of the CZMA, preserves the phased decisional structure developed by Congress for OCS development, and maintains a proper balance between the national interest in OCS resource development and California's interest in the preservation of its coastal zone. Any action with an identifiable impact on California's coastal zone will be subjected to CMA consistency review at a stage when

there is sufficient information to permit a meaningful consistency determination, and, at the same time, the issuance of OCS leases will not be precluded on the basis of speculative assumptions regarding the possible onshore impacts of hypothetical future activities. Restoration of the term "directly" to Section 307(c)(1) of the CZMA, therefore, leaves California fully able "to preserve, protect, develop and whenever possible restore the resources of the coastal zone" (S. Rep. No. 92-753, 92d Cong., 2d Sess. 1 (1972)) without unduly fettering the congressionally mandated "expedited exploration and development of the Outer Continental Shelf" (43 U.S.C. (Supp. V) 1802(1)). See *Watt* v. *Energy Action Educational Foundation, supra*, 454 U.S. at 154 n.2.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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